

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BRIGHT RESPONSE, LLC, Plaintiff, vs. GOOGLE INC., et al., Defendants.	Civil Action No. 2:07-cv-371-CE JURY TRIAL DEMANDED
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**YAHOO’S SUR-REPLY IN RESPONSE TO
BRIGHT RESPONSE’S MOTION TO COMPEL
PRODUCTION OF SOURCE CODE**

Defendant Yahoo files this sur-reply to inform the Court of relevant information and events that have occurred after the parties’ briefing. Most importantly, Yahoo produced all source code that is the subject of plaintiff Bright Response, LLC’s (“Bright Response”) motion to compel by October 7, 2009. Bright Response did not begin its review of the source code until October 22, 2009. (White Decl., Ex. 6)(Oct. 21, 2009 e-mail). After Yahoo made this source code available for inspection, Bright Response then requested additional source code. Yahoo responded that to the extent that Yahoo had additional source code responsive to Bright Response’s new requests, it would make the source code available for inspection. (White Decl., Ex. 3)(Oct. 26, 2009 letter). Because there are two parallel cases in this District with the same plaintiff’s counsel and some of the same accused instrumentalities, Yahoo informed Bright Response that they could consider the code produced in both of the cases for use in the Bright Response case, and offered to produce all of the source code—for both cases—on a single computer. (White Decl., Ex. 3)(Oct. 26, 2009 letter)

On October 27, 2009, Bright Response requested source code for Yahoo! Mail but Bright Response’s Disclosure of Asserted Claims and Infringement Contentions does not list Yahoo! Mail as an accused instrumentality (White Decl., Ex. 4)(Oct. 28, 2009 letter).

During the week of October 29, 2009, Bright Response requested new additional portions of source code and accepted Yahoo's offer to produce all of the source code for both cases on a single computer (White Decl., Ex. 5)(Nov. 1, 2009 letter). However, the volume of Bright Response's new requests for additional source code was substantial. For example, one new request alone includes 30 gigabytes of data and 29 million lines of code. *Id.* Despite this volume, Yahoo collected the new source code and agreed to make this available for inspection next week. Accordingly, Yahoo has produced all source code subject to plaintiff's motion to compel and addressed all new requests for additional source code made by Bright Response.

Because of this, on November 2, 2009, Yahoo's counsel met and conferred with Bright Response's counsel and communicated that Yahoo believed that the hearing on Bright Response's motion to compel was unnecessary. Yahoo indicated that it was willing to submit a stipulation for the Court's approval regarding the production of source code and the subjects of plaintiff's motion (White Decl., Ex. 5)(Nov. 1, 2009 letter). Counsel for Bright Response promised to discuss this and communicate with Yahoo's counsel regarding this proposal but has not done so. Yahoo has sought to avoid any discovery disputes with Bright Response in this case. Bright Response does not – and cannot – claim it has been prejudiced in any manner by Yahoo's production of source code. Furthermore, all source code that is the subject of Bright Responses' motion has been produced. Accordingly, Bright Response's motion should be denied.

Dated: November 2, 2009

Respectfully submitted,

/s/ Jason White

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CERTIFICATE OF SERVICE

This is to certify that all known counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per E. Dist. Tex. Loc. Ct. R. CV-5(a)(3) on November 2, 2009.

/s/ Jason White
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